Imperial Floral Distributors, Inc. *and* Gene Lawless *and* Amalgamated, Industrial and Toy and Novelty Workers of America, Local 223, International Union of Allied, Novelty and Production Workers, AFL–CIO. Cases 29–CA–18712, 29–CA–18728, and 29–CA–18792

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

Upon charges filed on November 25, December 1, and December 23, 1994, and an amended charge filed on February 28, 1995, the General Counsel of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on February 28, 1995, against Imperial Floral Distributors, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charges and consolidated complaint,[1] the Respondent failed to file an answer.

On August 14, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On August 16, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.[2] The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint will be considered admitted.[3]

In the absence of good cause being shown for the failure to file an answer, we grant the General Counsel's Motion for Summary Judgment insofar as the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act.

The consolidated complaint, however, further alleges in conclusionary terms that the Respondent's unfair labor practices are so serious and substantial in character that the possibility of erasing the effects of the unfair labor practices and holding a fair election by the use of traditional remedies is slight, and that therefore a bargaining order is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Although we agree that the violations of Section 8(a)(1) and (3) here are serious in nature, the complaint does not allege sufficient facts to enable the Board to evaluate the pervasiveness of the violations. For example, the complaint does not allege the size of the unit or the extent of dissemination, if any, of the violations among the employees not directly affected by them. Accordingly, consistent with prior Board decisions, we deny the General Counsel's Motion for Summary Judgment insofar as it alleges that a bargaining order is appropriate and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union.[4] We shall remand the case for a hearing before an administrative law judge on the issue of whether a bargaining order is an appropriate remedy under the circumstances of this case.[5]

[1] The consolidated complaint was served by certified mail on Respondent at its last known business address and at the home of its owner and president, Linda Keenan. In each case, the envelopes were returned as ''unclaimed'' by the U.S. Postal Service. A failure to claim certified mail, however, cannot be used as a means to defeat the purposes of the Act. *Michigan Expediting Service*, 282 NLRB 210 (1986). Further, on May 9, 1995, the General Counsel caused the consolidated complaint to be personally served on Keenan at her home.

[2] An order correcting the Notice to Show Cause issued on August 25, 1995, which extended the time for response to September 7, 1995.

[3] Although no further reminder or warning of the consequences of failing to file an answer was sent or given to the Respondent, this does not warrant denying the Motion for Summary Judgment. See, e.g., *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

[4] See, e.g., *FJN Mfg.*, 305 NLRB 656 (1991); *Bravo Mechanical*, 300 NLRB 1019 (1990); *Control & Electrical System Specialists*, 299 NLRB 642 (1990); *Protection Sprinkler Systems*, 295 NLRB 1072 (1989); *Binney's Casting Co.*, 285 NLRB 1095 (1987); and *Michigan Expediting Service*, supra. We therefore also deny the General Counsel's request for a make-whole Order under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as a remedy for the Respondent's alleged 8(a)(5) failure to bargain with the Union over the effects of the closure of its Glendale facility. In the absence of an answer, however, we find the various factual allegations underlying the alleged 8(a)(5) violations to be admitted. These allegations include the allegations that the bargaining unit is appropriate, that a majority of the unit employees have designated the Union as their bargaining representative, that the Union requested the Respondent to recognize and bargain with it as the exclusive representative in that unit, that the Respondent refused to do so, and that Respondent closed its facility without affording the Union notice or an opportunity to bargain about the effects of the closing on unit employees.

[5] Nothing contained herein requires a hearing if, in the event of an amendment to the consolidated complaint, the Respondent fails to answer thereby admitting evidence that would permit the Board to resolve the bargaining order issue. In such circumstances the General Counsel may renew the Motion for Summary Judgment with respect to the 8(a)(5) allegations and remedies.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times until about December 14, 1994, the Respondent, a New York corporation with its principal office and place of business at 74–07 88th Street, Glendale, New York, was engaged in the manufacture and nonretail sale of artificial plants and trees and related products. During the year ending December 14, 1994, Respondent purchased and received at its Glendale facility products, goods, and materials valued in excess of $50,000 directly from firms located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On about November 15, 1994, the Respondent, by its president, Linda Keenan, at its Glendale facility, informed employees that it would be futile for them to select the Union as their bargaining representative.

On about November 15 and 25, 1994, the Respondent, by Keenan, at its Glendale facility, interrogated employees about their membership in, activities on behalf of, and sympathy for, the Union.

At various times between November 15 and 25, 1994, Respondent, by its vice president, Ralph DeSteano, at its Glendale facility

(a) Threatened employees with layoffs, reduction from full-time to part-time work hours, and other unspecified reprisals if they join and support the Union.

(b) Informed employees that it would be futile for them to select the Union as their bargaining representative.

(c) Directed employees not to join the Union.

On about November 21, 1994, the Respondent, by verbal announcements by DeStefano, at its Glendale facility, promulgated and maintained certain rules because the employees joined or supported the Union and in order to discourage such activities. These rules

(a) Required employees to work separately in remote corners of Respondent's Glendale facility.

(b) Prohibited employees from speaking to each other at work.

(c) Prohibited employees from sitting while they are working, and removing their chairs.

(d) Prohibited employees from smoking at work.

(e) Required employees who call in sick to produce a doctor's note, or be subject to discharge.

(f) Required employees to report for work on time or be subject to discharge.

(g) Required employees to work new schedules, including Saturdays and Sundays.

On about November 21, 1994, the Respondent, by Keenan, at its Glendale facility, created the impression among employees that their meetings with and activities on behalf of the Union were being kept under surveillance by Respondent.

On about November 22, 1994, the Respondent, by Keenan, at its Glendale facility, threatened employees with plant shutdown because they joined and supported the Union.

On about November 22 through 25, 1994, the Respondent more closely supervised the work of its employees than it had previously because the employees joined or supported the Union.

On about November 25, 1994, Respondent issued its employee, Erik Jorgensen, a warning letter stating that future lateness would be grounds for termination, because he joined or supported the Union.

On about the dates set opposite their names, the Respondent laid off or discharged the following employees, and has since failed and refused to recall or reinstate, or offer to recall or reinstate them to their former positions of employment, because they joined or supported the Union:

Gene Lawless	November 21, 1994
Jose Arteaga	November 25, 1994
Maximo Saez	November 26, 1994

Commencing about November 28, 1994, and continuing to about December 14, 1994, when Respondent closed its Glendale facility, certain employees of the Respondent ceased work concertedly and engaged in a strike against Respondent on behalf of the Union. This strike was caused and prolonged by Respondent's unfair labor practices described above.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

In addition, by promulgating and maintaining until it closed various work rules, more closely supervising the work of its employees and issuing a warning letter to an employee, and laying off, discharging, and refusing to recall or reinstate employees because they joined or supported the Union, the Respondent has also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off or discharged employees Gene Lawless, Jose Arteaga, and Maximo Saez and refused to recall or reinstate them, we shall order the Respondent, in the event it reopens its facility, to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges. In addition, we shall order the Respondent to make them whole for any loss of earnings as a result of the discrimination against them by paying them backpay from the time of their layoffs and/or discharges until the date the facility closed. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall further order the Respondent to remove from its files any reference to the warning letter to employee Jorgensen and to the layoff or discharges of employees Lawless, Arteaga, and Saez and notify these employees that this has been done and that those actions will not be used against them in any way.

In addition, having found that the strike of Respondent's employees was caused and prolonged by Respondent's unfair labor practices, we shall order the Respondent, in the event it resumes operations and the employees offer to return to work, to offer those employees immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions.

Finally, inasmuch as the Respondent's facility is now closed, we shall order the Respondent to mail copies of the notice to all unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Imperial Floral Distributors, Inc., Glendale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that it is futile for them to seek union representation.

(b) Interrogating employees regarding their union membership, activities, and sympathies.

(c) Threatening employees with layoff, reduction in work hours, plant closure, or other unspecified reprisals because they joined the Union.

(d) Directing employees not to join the Union.

(e) Creating an impression among its employees that their union activities are under surveillance.

(f) More closely supervising the work of its employees because of their union activities.

(g) Promulgating and maintaining new work rules because employees join or support the union.

(h) Laying off, discharging, issuing written warnings to, or otherwise discriminating against employees, because they joined or supported the Union.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the new work rules promulgated on November 21, 1994.

(b) Offer immediate and full reinstatement to employees Lawless, Arteaga, and Saez, in the event Respondent reopens the Glendale facility, to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful layoff, discharges, and warning, and notify employees Jorgensen, Lawless, Arteaga, and Saez in writing that this has been done and that those actions will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) In the event Respondent reopens its facility and its striking employees offer to return to work, offer them immediate and full reinstatement to their jobs or, if those positions no longer exist, to substantially equivalent positions.

(f) Mail signed and dated copies of the attached notice marked ''Appendix''[6] to all unit employees employed by the Respondent at its Glendale facility at the employees' last known addresses. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for the purpose of holding a hearing before an administrative law judge

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

or other appropriate action with respect to the alleged 8(a)(5) violations and remedies sought.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform employees that it is futile for them to seek union representation.

WE WILL NOT interrogate employees about their union activities, membership, or sympathies.

WE WILL NOT threaten employees with layoffs, reduction in work hours, plant closure, or other unspecified reprisals because they joined the Amalgamated, Industrial and Toy and Novelty Workers of America, Local 223, International Union of Allied, Novelty and Production Workers, AFL–CIO or any other union.

WE WILL NOT direct our employees not to join the Union.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT more closely supervise our employees because of their union activity.

WE WILL NOT promulgate and maintain new work rules because our employees join or support the Union.

WE WILL NOT layoff, discharge, issue written warnings to, or otherwise discriminate against employees because they joined or supported the Union.

WE WILL NOT in any like or related manner interefere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the November 21, 1994 work rules.

WE WILL, in the event we reopen the Glendale facility, offer employees Gene Lawless, Jose Arteaga, and Maximo Saez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them, plus interest.

WE WILL notify employees Lawless, Arteaga, Saez, and Erik Jorgensen that we have removed from our files any reference to their unlawful layoff, discharges, or warning, and that we will not use those actions against them in any way.

WE WILL, in the event we reopen the Glendale facility, offer immediate and full reinstatement to the employees on strike at the time we closed our facility to their former jobs or, if those positions no longer exist, to substantially equivalent positions.

IMPERIAL FLORAL DISTRIBUTORS, INC.